IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:05-cv-00329-GKF-PJC**
	)	
TYSON FOODS, INC., *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
ON PLAINTIFFS' RCRA CLAIM (COUNT 3)
AND INTEGRATED BRIEF IN SUPPORT

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The undersigned Defendants respectfully move for an order of summary judgment on Count 3 of Plaintiffs' Second Amended Complaint ("SAC"), which alleges a claim under the Resource Conservation and Recovery Act's ("RCRA") "citizen suit" provision. 42 U.S.C. § 6972(a)(1)(B). Congress enacted RCRA to address the mounting problem of discarded trash filling landfills and marring the landscape, not to prevent the beneficial and productive reuse of materials created during other production processes. Plaintiffs' resort to RCRA to prevent the useful application of poultry litter as a fertilizer and soil conditioner is contrary to the statute's text and purpose, and to EPA's implementation thereof. The Court previously rejected Plaintiffs attempt to preliminarily enjoin all litter application in the IRW pursuant to RCRA, Opinion and Order, Dkt. No. 1765 at 7 (Sept. 29, 2008), which decision the Tenth Circuit has now affirmed. *Attorney General of the State of Oklahoma v. Tyson Foods, Inc.*, No. 08-5154 (10th Cir. May 13, 2009). Plaintiffs RCRA claim should now be dismissed.

RCRA requires a plaintiff to prove that the "disposal" of a "solid waste" causes an imminent and substantial endangerment to human health or the environment. Plaintiffs cannot meet this test first because poultry litter is not a "solid waste" covered by RCRA. Moreover, Defendants do not "contribut[e] to" the land application of poultry litter within the meaning of RCRA. Finally, while Plaintiffs allege that bacteria in the waters of the Illinois River Watershed ("IRW") may endanger human health, the undisputed facts show that these bacteria are ubiquitous in the environment, and Plaintiffs cannot demonstrate that they derive from poultry litter as opposed to myriad other sources. Nor can Plaintiffs identify any individual ever sickened by the longstanding use of poultry litter in the IRW. For these reasons, Defendants respectfully request that the Court enter summary judgment on Count 3.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Poultry growers ("Contract Growers" or "Growers") are farmers and ranchers who

contract with poultry companies such as Defendants to raise poultry. *See* Butler Dep. at 118:23-119:2 (Ex. 1); P.I.T. at 1336:12-1339:3, 1374:23-1375:14, 2025:9-15, 2030:7-2032:19, 2035:2-7, 2040:10-24, 2049:8-10 (Ex. 2); Exs. 3-8 (Grower contracts).

2. Poultry in the IRW are raised in houses or barns using equipment owned by Contract Growers. *See* P.I.T. at 1371:7-11, 1386:6-12, 2030:7-15 (Ex. 2); Anderson Dep. at 85:12-24 (Ex. 9); Exs. 3-8; *see*, *e.g.*, Ex. 3 at TSN22977SOK ¶2(A); Ex. 6 at SIM AG 37096 ¶3(b).

3. Growers typically purchase the bedding material—usually consisting of rice hulls or wood shavings—to place inside the poultry houses or barns to provide a soft and absorbent material on which to raise poultry. *See* Butler Dep. at 239:2-4 (Ex. 1); P.I.T. at 1338:17-1339:3, 2033:2-8 (Ex. 2); Exs. 3-8; *see*, *e.g.*, Ex. 3 at TSN22977SOK ¶2(A); Ex. 6 at SIM AG 37096 ¶3(b); *see also* Ex. 10.

4. "Poultry litter consists of fecal excrement and … bedding material … and other components such as feathers and soil. Wood shavings, sawdust, and soybean, peanut, or rice hulls are all common" bedding materials. Ex. 10; *see* Butler Dep. at 82:9-25 (Ex. 1).

5. Poultry litter is a widely utilized fertilizer, which provides soil nutrients, increases crop yields and outperforms commercial fertilizers. *See*, *e.g.*, Ex. 11 at 1, 2; Ex. 12 at 1; Ex. 10; P.I.T. at 31:11-14, 540:19-541:4, 1764:23-1768:9 (Ex. 2); Peach Dep. at 45:7-45:10, 126:22-128:9, 136:17-137:24 (Ex. 13); Ex. 14 at 7-8.

6. Poultry litter contains all 16 nutrients essential to plant growth, and also improves soil structure, tilth, organic content, and pH balance. *See* P.I.T. at 496:23-501:10, 516:3-516:21, 540:19-541:4, 1764:15-67:1 (Ex. 2); Zhang Dep. at 110:25–115:15 (Ex. 15); Ex. 14 at 7-8.

7. Soils in the IRW derive agronomic benefit from the nutrients and conditioning properties of poultry litter, including poultry litter's acid neutralizing effects. at 7-8 (Ex. 14). Many fields within the IRW need phosphorous compounds to be added to the soil for improved

crop production. Zhang Dep. at 43:13-20 (Ex. 15).

8. Oklahoma and its agents recognize poultry litter as an effective fertilizer, and actively encourage and approve of its use. *See* Peach Dep. at 79:3-79:9 ("Oklahoma Conservation Commission teach[es] people how to … apply … and use litter in the IRW") (Ex. 13); *see, e.g.*, 2 O.S. § 10-9.1, *et seq.*; O.A.C. § 35:17-5-1; Ex. 16; Ex. 17; Ex. 18 (Parrish Dep. at 149:14-20, 218:8-219:25); Undisputed Facts ¶5 (citing statements by agents of Oklahoma).

9. Arkansas also recognizes litter as an effective fertilizer, and encourages and approves its use. *See, e.g.*, Ark. Code Ann. § 15-20-902 (poultry litter "provides nutrients that are beneficial to plant growth [and] allows the addition of nutrients to the soil at a low cost"); Ark. Code Ann. § 15-20-1102 (enacting poultry litter laws and regulations to "regulate the utilization of poultry litter to protect the area while maintaining soil fertility").

10. Non-party farmers and ranchers use poultry litter in the IRW as a fertilizer and soil conditioner. *See* P.I.T. at 1295:2-5, 1371:2-1372:14, 1379:16-1381:6, 2048:14-2049:6 (Ex. 2); Littlefield Dep. at 40:8-42:19 (poultry litter used to fertilize pastureland and hay crops) (Ex. 19); Berry Dep. at 98:5-98:10 (Ex. 20).

11. Approximately one-half of all poultry litter used as fertilizer in the IRW is land-applied by non-party farmers and ranchers who are not Contract Growers, but who purchase or obtain the litter from Growers or other sources (not Defendants) and maintain no relationship with Defendants. *See* Exs. 21-24.

12. Non-party farmers and ranchers in the IRW use poultry litter as a substitute for commercial fertilizers. *See* Berry Dep. at 241:15-19 (Ex. 20); Scott Thompson Dep. at 109:1-3 (Ex. 25); Littlefield Dep. at 73:24-75:24 (Ex. 19); Zhang Dep. at 39:6-43:1 (Ex. 15); *see also* P.I.T. at 1381:7-1383:17 (Randall Robinson explaining that the use of poultry litter instead of commercial fertilizer saves him approximately $17,000 per year) (Ex. 2); *id.* at 120:16-121:9

(some cattle ranchers and hay growers purchase litter because they believe it "grows grass better than commercial" fertilizer).

13. Poultry litter has substantial economic value in the IRW, *see* P.I.T. at 1295:7-10 (Ex. 2); Zhang Dep. at 36:13-24 (Ex. 15); Ex. 26 at 1, and is routinely bought and sold by non-party farmers and ranchers, *see* P.I.T. at 1376:15-1377:1, 2024:25-2025:7, 2032:22-25, 2034:12-25, 2052:21-2053:14 (Ex. 2).

14. Growers, not Defendants, decide when to clean out poultry litter from their poultry houses or barns. *See* P.I.T. at 1341:13-17, 1390:8-25, 2023:24-2024:6, 2031:20-23, 2032:9-11 (Ex. 2); Butler Dep. at 78:25-83:4 (Ex. 1).

15. Growers, not Defendants, own the poultry litter generated on their farms. *See* P.I.T. at 1372:2-9, 1376:15-1377:1, 1380:1-6, 2021:23-2022:2, 2033:25-2034:10, 2045:6-18, 2048:14-2049:6 (Ex. 2); Ex. 27 at Hunton Aff. ¶¶4, 8, Pigeon Aff. ¶¶6, 7, Reed Aff. ¶¶7, 8, 11, Saunders Aff. ¶¶5, 6; Exs. 3-8; *see, e.g.*, Ex. 5 at PFIRWP-024054 ¶II(H); Ex. 6 at SIM AG 37099 ¶7.

16. Access to and use of poultry litter is an inducement for farmers and ranchers to raise poultry. *See* P.I.T. at 2033:25-2034:10, 2045:1-4, 2048:14-2049:6 (Ex. 2).

17. Growers' contracts with Defendants do not infringe on the Growers' ownership and use of the litter, with the exception of provision(s) requiring Growers to comply with all federal, state and local laws and regulations related to the sale, distribution, storage, management or use of poultry litter. *See* P.I.T. at 1340:22-1341:12, 1390:4-7, 2023:24-2024:6 (Ex. 2); *see*, *e.g.*, Ex. 3 at TSN22977SOK – TSN22978SOK ¶¶2(F), 2(H), 11(G); Ex. 4 at GE 41403 ¶V(A); Ex. 5 at PFIRWP-024052 – PFIRWP-024062 ¶¶II(F), III(A)(9)-(11), VI(A)-(G); Ex. 6 at SIM AG 37096 ¶3(o); Ex. 7 at CM-000001372 ¶3; Ex. 8 at CARTP172228 ¶7.

18. Growers sell, distribute, store, or use their poultry litter at their own discretion, subject to state and federal law. *See* P.I.T. at 1340:3-1342:17, 1376:15-1377:14, 1390:17-19,

1391:9-16, 1394:7-1395:15, 2023:24-2024:6, 2024:25-2025:15, 2031:24-25, 2032:12-25, 2033:10-23, 2034:9-25, 2045:6-2046:9, 2052:21-2053:14 (Ex. 2); Littlefield Dep. at 53:2-9 (Ex. 19); Butler Dep. at 78:16-24 (Ex. 1); Ex. 27 at Hunton Aff. ¶¶4, 8, Pigeon Aff. ¶¶6, 7, Reed Aff. ¶¶7, 8, Saunders Aff. ¶¶5, 6.

19. If a Grower decides to apply poultry litter as a fertilizer to the Grower's own farm or pasture land, the Grower, not Defendants, determines the time, method, location, and amount of poultry litter to be applied, subject to state and federal law. *See* Littlefield Dep. at 53:2-9 (Ex. 19); P.I.T. at 1341:22-1342:17, 1377:2-14, 1390:17-19, 1391:9-16, 2023:24-2024:6, 2031:24-25-2032:12-15, 2033:13-23, 2045:24-2046:9 (Ex. 2); Ex. 27 at Hunton Aff. ¶¶4, 8, Pigeon Aff. ¶¶6, 7, Reed Aff. ¶¶7, 8, Saunders Aff. ¶¶5, 6; *see also* Undisputed Fact ¶17.

20. If a Grower decides to sell or distribute poultry litter that is removed from the Grower's poultry houses or barns, the Grower, not Defendants, determines the buyer, timing, quantity, and price for the transaction. *See* P.I.T. at 1341:18-21, 1376:15-1377:1, 1391:9-16, 1394:7-1395:15, 2024:25-2025:15, 2032:16-19, 2032:22-25, 2033:10-12, 2034:9-25, 2045:20-23, 2052:21-2053:14 (Ex. 2); Butler Dep. at 78:16-24 (Ex. 1); Ex. 27 at Hunton Aff. ¶¶4, 8, Pigeon Aff. ¶¶6, 7, Reed Aff. ¶8, Saunders Aff. ¶6; *see also* Undisputed Fact ¶17.

21. If a Grower sells or distributes poultry litter, the Grower, not Defendants, receives and retains the proceeds from the sale or distribution. *See* Butler Dep. at 243:3-17 (Ex. 1); Fisher I Dep. at 317:13-20 (Ex. 28); P.I.T. at 2052:21-2053:14 (Ex. 2); Ex. 27 at Hunton Aff. ¶4, Pigeon Aff. ¶6, Reed Aff. ¶11.

22. There is no record evidence demonstrating that any Defendant participates in, or controls, any Contract Grower's management, sale, distribution, storage, or use of poultry litter.

23. There is no record evidence demonstrating that any Defendant participates in, or controls, the management, sale, distribution, storage, or use of poultry litter by non-party farmers

and ranchers who obtain poultry litter from Growers or other sources (not Defendants).

24. Oklahoma and Arkansas laws regulate the non-party farmers and ranchers who land apply poultry litter, not the poultry companies with whom Growers contract. *See, e.g.,* Gunter Dep. at 78:8-80:18; 152:8-157:1 (Ex. 29); Peach Dep. at 117:8-24, 120:12-122:9 (Ex. 13); Parrish Dep. at 201:2-202:3 (Ex. 18); Littlefield Dep. at 20:20-24:22, 32:7-38:6 (Ex. 19); *see generally* 2 O.S. § 10-9.13 *et seq.*; 2 O.S. § 10-9.16 *et seq.*; O.A.C. § 35:17-5-1 *et seq.*; O.A.C. § 35-17-7-1 *et seq.*; Ark. Code Ann. § 15-20-901, *et seq.*; Ark. Code Ann. § 15-20-1101, *et seq.*; ANRC Reg. 1901.1, *et seq.*; ANRC Reg. 2001.1, *et seq.*; ANRC Reg. 2101.1, *et seq.*; ANRC Reg. 2201.1, *et seq.*; *see also, e.g.*, 2 O.S. §§ 10-9.3, 10-9.4, 10-9.5.F(1), 10-9.7, 10-9.7.C, 10-9.17, 10-9.18; Ark. Code Ann. § 15-20-1001, *et seq.*; Ark. Code Ann. §§ 15-20-904, 15-20-1113.

25. The only poultry litter regulation specifically directed towards Defendants is Oklahoma's rule that poultry integrators may not contract with any Grower who has not completed the State's required program to educate Growers on the appropriate use of their litter. *See* 2 O.S. § 10-9.5.G; Gunter Dep. at 154:9-157:1 (Ex. 29).

26. Plaintiffs have not studied bacterial fate and transport in the IRW. *See Tyson Foods*, Slip. Op. at 14; P.I.T. at 301:21-302:10, 405:8-13, 680:16-18, 688:24-699:17 (Ex. 2); Olsen Dep. at 25:21-26; 318:21-319:6 (Ex. 30); Harwood Dep. at 9:9-14:5 (Ex. 31); Macbeth Dep. at 84:22-25, 86:21-87:2 (Ex. 32); Olsen Dep. at 565:17-566:6 (Ex. 33).

27. Different bacteria have different "fate and transport" characteristics, which govern their ability to move and survive in the environment, which depend on numerous factors such as the particular bacterium's surface charge, shape, size, and mode of movement, and environmental stresses including sunlight, oxygen, temperature, humidity, pH, salinity, desiccation, topography, vegetation, and predation. *See* P.I.T. at 682:9-689:18, 1830:15-1832:13, 1837:10-1840:2, 1857:7-1858:2 (Ex. 2).

28. Poultry litter in the IRW is spread on the ground in a thin layer by trucks or other equipment. *See* P.I.T. at 1375:15-1376:14 (Ex. 2). Because sunlight kills bacteria, bacteria that are spread onto the ground in thin layer and exposed to direct sunlight can die off in a few hours. *See id.* at 635:2-636:7, 687:9-688. Bacteria deposited in cattle manure are sheltered and can persist and multiply for days. *See id.* at 739:12-740:1, 1851:8-1854:25.

29. Bacteria levels in IRW waters are substantially similar to bacteria levels in waters statewide, including locations that have little or no poultry farming. *See Tyson Foods*, Slip Op. at 14; Opinion and Order, Dkt. No. 1765 at 7 (Sept. 29, 2008); P.I.T. at 2059:24-2063:19, 2076:13-2083:18 (Ex. 2); Ex. 34 at 2-4, 2-6 to 2-13, 2-15 to 2-17.

30. The presence of fecal "indicator bacteria" may suggest fecal contamination. P.I.T. at 632:14-634:4 (Ex. 2). Most warm-blooded creatures shed fecal indicator bacteria, *see id.* at 239:22-240:6, 694:9-696:16, 1420:20-1421:6, 1434-1437:13, 1856:14-1860:20, 2063:20-2068:24, which can persist in the environment, *see id.* at 635:2-636:7.

31. The indicator organism approach to assessing human health risk in recreational waters is based on epidemiological data that is more than 20 years old and was based solely on waters impacted by human, not animal, waste. *See* P.I.T. at 1828:11-1830:7, 1933:2-1394:13 (Ex. 2); Ex. 35 (www.epa.gov/waterscience/criteria/recreation/); Ex. 36 at 8-12; Ex. 37 at 3.

32. EPA has convened experts to replace current indicator organism standards with "up-to-date, scientifically-defensible criteria." Ex. 35; *see* P.I.T. at 1819:25-1820:3 (Ex. 2); Ex. 38.

33. Plaintiffs tested water samples in the IRW for various types of bacteria that can cause human illness ("pathogenic bacteria") but found no *campylobacter* and only extremely infrequent and low levels of *salmonella*. *See* P.I.T. at 1444:15-1445:8, 1832:15-20 (Ex. 2).

34. Rates of salmonellosis and campylobacteriosis in the IRW are substantially similar to rates statewide. *See* Ex. 36 at 13-16, 38-49; Crutcher Dep. at 60:12-61:9 (Ex. 39).

35. Oklahoma public health officials do not perceive a health risk from the use of poultry litter as a fertilizer in the IRW. *See, e.g.*, Crutcher Dep. at 38:5-39:17, 48:3-7, 51:14-52:7, 55:6-25, 73:23-74:18, 98:16-20, 104:105:3, 109:16-116:3 (Ex. 39); *see also* Ex. 40 at 1-6; Steve Thompson Dep. at 34:19-25 (Ex. 42).

36. Plaintiffs are unable to identify a single person sickened in the IRW by exposure to poultry litter or poultry litter-impacted water. *See* Harwood Jan. Dep. at 291:14-292:5 (Ex. 41).

37. Oklahoma has never classified, regulated, or otherwise treated poultry litter as a RCRA "solid waste." *See* Steve Thompson Dep. at 18:3-22:25 (Ex. 42); Scott Thompson Dep. at 41:15-19, 47:4-17, 50:6-13, 66:2-67:18 (Ex. 25).

LEGAL STANDARD

"Summary judgment … is an important procedure 'designed to secure the just, speedy and inexpensive determination of every action.'" *Culp v. Sifers*, 550 F. Supp. 2d 1276, 1281 (D. Kan. 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). Summary judgment is appropriate where "there is no genuine issue as to any material fact and … the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party is entitled to summary judgment as a matter of law where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Where the movant shows the "absence of a genuine issue of material fact, the non-movant may not rest on its pleadings but must set forth specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Sierra Club v. Seaboard Farms*, 387 F.3d 1167, 1169 (10th Cir. 2004); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (non-moving party must provide admissible evidence "on which a jury could reasonably find for" it); *Matsushita Elec. Indus. v. Zenith*, 475 U.S. 574, 586 (1986). Sufficiency of the evidence turns

on whether it presents a "disagreement [that] require[s] submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

ARGUMENT

A RCRA citizen suit, 42 U.S.C. § 6972(a)(1)(B); SAC ¶¶ 95-96, may lie against

> any person … who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972(a)(1)(B). In order to prevail on Count 3, Plaintiffs must therefore prove that: (1) poultry litter applied to fields in the IRW is a "solid waste"[1] within the meaning of RCRA; (2) Defendants contributed "to the past or present handling, storage, treatment, transportation, or disposal of" that poultry litter; and (3) the land application of poultry litter may present an imminent endangerment. *Id*. Plaintiffs cannot demonstrate any of these.

I. POULTRY LITTER IS NOT A "SOLID WASTE" COVERED BY RCRA

Count 3 should be dismissed for the simple reason that poultry litter is not a "solid waste" covered by RCRA. RCRA's text, legislative history, administrative enforcement, and judicial treatment make clear that it reaches only materials that have actually been discarded, not valuable materials being put to a beneficial use. Because poultry litter is used and valued in the IRW as a fertilizer and soil conditioner, it is not a RCRA solid waste as a matter of law.

A. Animal Manures Such As Poultry Litter Are Not "Solid Waste" Within The Meaning Of RCRA When They Are Used As Fertilizer Or Soil Conditioner

RCRA's citizen-suit provision applies only to risks caused by RCRA-covered "solid

[1] Plaintiffs originally asserted that poultry litter "is a solid and / or hazardous waste under" RCRA, SAC ¶ 91, but subsequently narrowed their claim to address only solid (and not hazardous) waste. *See* Motion for Preliminary Injunction and Integrated Brief in Support Thereof, Dkt. No. 1373, at 12-13 (Nov. 14, 2007) (asserting RCRA claim only as to solid waste); P.I.T. 950:25-951:23 (waiving any hazardous waste claim as to RCRA). At any rate, material can constitute a hazardous waste under RCRA only if it is first a solid waste. *See* 42 U.S.C. § 6903(5); 40 C.F.R. § 261.3; *United States v. Self*, 2 F.3d 1071, 1076-77 (10th Cir. 1993).

waste." As used in RCRA, "solid waste" includes

> any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations.

42 U.S.C. § 6903(27). RCRA thus delineates four categories of "solid waste": "garbage;" "refuse;" "sludge" from pollution control facilities; or other "discarded material." The third plainly has no application in this case. Thus, "material … from … agricultural operations" such as poultry litter may constitute a RCRA "solid waste" only to the extent that it is "garbage, refuse," or is "other discarded material." *Id.*

Statutory terms should be "interpreted in accordance with their ordinary meaning." *BP Am. Production Co. v. Burton*, 549 U.S. 84, 91 (2006). This plain meaning "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990) ("Our 'starting point is the language of the statute,' … but 'in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'") (citations omitted). If Congress' intent is clear, then "that intention must be given effect." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Applying these principles, courts agree that material is "discarded" within RCRA when it is "disposed of," "thrown away," or "abandoned." *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 55-56 (D.C. Cir. 2000); *Am. Mining Congress v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987); *Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc.*, 877 F. Supp. 476, 481 (D. Minn. 1995); *Zands v. Nelson*, 779 F. Supp. 1254, 1261-62 (S.D. Cal. 1991). Animal manures that are bought, sold, and applied to the soil as a fertilizer or soil conditioner plainly do not meet this definition. Indeed, in

adopting RCRA, Congress expressly noted that RCRA does not regulate such manures because they are not "discarded" and thus do not meet the definition of "solid waste":

> Waste itself is a misleading word in the context of the committee's activity. Much industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses…. *Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.*

H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. at 2, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240 (emphasis added); *see Safe Air For Everyone* ["*SAFE*"] *v. Meyer*, 373 F.3d 1035 (9th Cir. 2004) ("In enacting RCRA, Congress also declared that agricultural products that could be recycled or reused as fertilizers were not its concern."). Legislative history such as this is particularly reliable where, as here, it corroborates the statute's plain meaning. *INS v. Cardozo-Fonseca*, 480 U.S. 421, 432 & n.12 (1987).

In assessing whether material has been discarded, courts have looked primarily to whether the material has been (or is proposed to be) put to some beneficial use.[2] For example, in *No Spray Coalition v. City of New York*, the Southern District of New York held that despite

[2] Courts have disagreed whether material that is beneficially reused in a process other than the process that created it can be a RCRA solid waste. In *American Mining Congress*, the D.C. Circuit held that material "destined for beneficial reuse or recycling in a continuous process by the generating industry itself" was not RCRA solid waste. 824 F.2d at 1186. Several other courts then took the D.C. Circuit to have held that materials that are reused in a *different* industry *necessarily* are solid waste. *See Owen Steel Co. v. Browner*, 37 F.3d 146, 150 (4th Cir. 1994); *United States v. ILCO, Inc.*, 996 F.2d 1126, 1131 (11th Cir. 1993). Subsequently, however, the D.C. Circuit rejected this misinterpretation of *American Mining Congress*, making clear that it had "never said that the RCRA compels the conclusion that material destined for recycling in another industry is necessarily 'discarded.'" *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2003). Instead, in *Safe Food*, it held that zinc fertilizers made with zinc recycled from other industries were not RCRA solid waste. The EPA subsequently concurred in the D.C. Circuit's view. *See* EPA, *Proposed Rules: Identification of Non-Hazardous Materials That Are Solid Waste*, 74 Fed. Reg. 41-01 (Jan. 2, 2009) ("EPA has the discretion to determine if material is not a solid waste, even if it is transferred between industries."). The latter view better effects RCRA's purpose of increasing the reuse of materials that might otherwise be discarded. *See Tyson Foods*, Slip Op. at 10.

being sprayed across the landscape (and thereby causing pollution), pesticide used with the intention to kill pests is not "discarded" as it is put to its intended and useful purpose. 2000 WL 1401458, at *3 (S.D.N.Y. Sept. 25, 2000). And, in *Simsbury-Avon Preservation Society, LLC v. Metacon Gun Club*, the District of Connecticut concluded that a bullet fired from a gun is not "discarded" (even though it falls into the environment and has a polluting effect) because the shooter "is putting the lead bullet to its intended use." 2005 U.S. Dist. LEXIS 11699 at *18 (D. Conn. June 14, 2005); *see Otay Land Co. v. U.E. Ltd.*, 440 F. Supp. 2d 1152, 1179-80 (S.D. Cal. 2006) (munitions used for their intended purpose are not discarded); *Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club*, 1996 W.L. 131863, at *8 (S.D.N.Y. Mar. 22, 1996) (same). Conversely, material that is not being put to its useful and intended purpose is "discarded." For example, oil that has leaked from a storage tank into the soil is no longer a "useful product" but rather is a RCRA-covered waste. *Craig Lyle Ltd.*, 877 F. Supp. at 481-82; *Zands*, 779 F. Supp. at 1262; *Paper Recycling, Inc. v. Amoco Oil Co.*, 856 F.Supp. 671, 675 (N.D. Ga. 1993). Similarly, materials spilled inadvertently from a rail car have been discarded rather than put to any intentional, beneficial use. *Reading Co. v. City of Philadelphia*, 823 F. Supp. 1218, 1236-37 (E.D. Pa. 1993); *see also Conn. Coastal Fishermen's Assoc. v. Remington Arms Co.*, 777 F. Supp. 173, 193-94 (D. Conn. 1991) (lead shot discarded where there is no attempt made to reuse the material).

This same analysis applies to the application of agricultural materials to improve soil productivity, even where some portion of the product is not beneficially consumed but escapes into the environment. In *SAFE*, the Ninth Circuit held that grass residues burnt to fertilize fields were "the type of agricultural remnant, used by farmers to add nutrients to soil, that Congress did not consider to be 'discarded.'" 373 F.3d at 1046. The plaintiff argued that the fact that smoke particles blew off the field demonstrated that the burning was a disposal practice. The Ninth

Circuit disagreed, holding that *even an incidental* agricultural benefit takes a practice outside of RCRA's scope. *Id.* at 1044. The burning extended the life of bluegrass fields by providing beneficial nutrients, reducing weeds, insects and disease, and improving sunlight absorption. *Id.* at 1044-45. Although ash and smoke were carried off, the court declined to hold that the grass residue was "discarded." *Id.* at 1046 n.13. The common theme of all of these cases is that the intended use of the product governs, not whether that use may cause pollution. "[W]hether grass residue has been 'discarded' is [determined] independently of *how* the materials are handled" including whether that handling allegedly causes pollution. *Id.*; *see also No Spray Coalition*, 2000 WL 1401458, at *3 (pesticide not discarded despite being released into the air generally).

Materials are also not "disposed" of when they have substantial monetary value in the application that is alleged to be a "discard." People do not pay for the right to throw things away. As EPA has argued, where "market participants treat the … materials more like valuable products than like negatively-valued wastes [and] manag[e] them in ways inconsistent with discard," the materials in question are likely not discarded waste. *Safe Food*, 350 F.3d at 1269. The D.C. Circuit has recognized that "market valuation and management practices" are among the "reasonable tool[s] for distinguishing products from wastes." *Id.* Similarly, in *Otay*, the district court noted that lead shot fired could be (and had previously been) reused in shotgun shells, and therefore retained value. 440 F. Supp. 2d at 1182-83. And, in the related CERCLA context, when a product is purchased as a lower-cost replacement for another useful product, it is not "waste." *See RSR Corp v. Avanti Dev., Inc.*, 69 F. Supp. 2d 1119 (S.D. Ind. 1999) (no disposal where recovered lead was a "less expensive alternative to newly-mined lead"); *Douglas County, Neb. v. Gould, Inc.*, 871 F. Supp. 1242, 1243-44 (D. Neb. 1994) (same).[3]

[3] Again, some courts have taken a contrary view. The Ninth Circuit, for example, concluded that the fact that material was valuable was not relevant to whether it was discarded. *SAFE*, 373 F.3d

Thus, to the extent that material has market value, a beneficial use, and is put to that use, it is not a RCRA-covered solid waste. Therefore, to the extent that animal manures such as poultry litter are: (1) bought, sold, and valued in the marketplace as fertilizer or soil conditioner; and (2) applied to the soil as fertilizer or soil conditioner, they are not covered by RCRA.

B. EPA Has Consistently Held That Animal Manure Applied To The Soil As Either Fertilizer Or Soil Amendment Is Not "Solid Waste" Within RCRA

The foregoing statutory construction is fully supported by EPA's conduct as RCRA's primary enforcer. *Phillips Petro. Co. v. EPA*, 803 F.2d 545, 558 (10th Cir. 1986). To the extent that RCRA's text and history are unclear (which they are not), EPA's judgment merits substantial deference. *See United States v. Power Eng. Co.*, 303 F.3d 1232, 1236-38 (10th Cir. 2002); *Maier v. EPA*, 114 F.3d 1032, 1043 (10th Cir. 1997). EPA has consistently excluded animal manures applied to the soil as fertilizer or soil conditioner from RCRA "solid waste."

Under RCRA, solid wastes must be disposed of only at approved facilities. 42 U.S.C. §§ 6943(a)(2)(B); 6944(b); 6945(a).[4] Accordingly, one of EPA's first steps in implementing RCRA was to propose a rule distinguishing approved "sanitary landfills" from disapproved "open dumps." 42 U.S.C. § 6944(a); 42 Fed. Reg. 34446 (July 5, 1977). This rulemaking turned on the application of the statutory definition of "solid waste," and thus provides EPA's interpretation of that term. EPA's proposed rule expressly excluded "agricultural wastes, including manures[,] returned to the soil as fertilizers or soil conditioners." 43 Fed. Reg. 4942, 4943 (Feb. 6, 1978).

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at 1043 n.8. But again, the D.C. Circuit has the better view. The fact that a product can fetch a substantial price on the market strongly suggests that it is not "garbage," "refuse," or otherwise "discarded." *Safe Food*, 350 F.3d at 1269.

[4] This requirement is implemented through state law. *See* 27A O.S. § 2-10-301.A.1 (requiring disposal of solid waste at "a site or facility for which a permit for solid or hazardous waste disposal has been issued by [ODEQ]"); A.C.A. § 8-6-205(a)(3) (prohibiting "dispos[al] of solid wastes at any disposal site or facility other than [one] for which a permit has been issued."); *see also* 27A O.S. § 2-10-301.A.2 (permitting requirement for solid waste disposal facilities); A.C.A. § 8-6-903(a) (same); A.C.A. § 8-6-205(a)(2) (same).

Thus, the application of animal manure as fertilizer does not turn a field into an illegal "open dump" under RCRA because the material is not a statutory solid waste. EPA re-emphasized this point in adopting its final rule, still effective today, which provides that the criteria used to determine what constitutes an "open dump" "do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners." 40 C.F.R. § 257.1(c)(1); *see also* 44 Fed. Reg. 53438, 53440 (Sept. 13, 1979) (final rules).[5]

EPA's subsequent conduct confirms its continuing view that animal manures applied to the land as fertilizer or soil conditioner are not RCRA "solid waste." In 1981, EPA promulgated guidance to help states to properly classify solid waste facilities. The procedures "detailed in this manual [were] specifically designed for the evaluation of existing solid waste disposal facilities." EPA, *Classifying Solid Waste Disposal Facilities: A Guidance Manual* 4 (Jan. 1981). The manual was intended for use in "evaluations of … waste landspreading facilities, including those accepting sludges or wastes from … agricultural operations." *Id.* Again, EPA expressly excluded "facilities where agricultural wastes (*e.g.*, manure and crop residues) are returned to the soil as fertilizer or soil conditioners." *Id.* at 5. Then, from 1981 to 1985, EPA proceeded to identify all open dumps in the country but did not list a single poultry litter land application site. *See, e.g.*, EPA, *Inventory of Open Dumps* (May 1983).

In 1984, Congress amended and reauthorized RCRA. Congress is presumed to be aware of agency interpretations, and when it re-authorizes a statute without changing the relevant provision or upsetting the agency's announced view, courts presume that Congress "adopt[ed] that interpretation." *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). The 1984 amendments

[5] In support of its final rule, EPA issued an environmental impact statement that catalogued the costs associated with regulation of solid waste under RCRA but which made no mention of any costs associated with disposal of animal manure. EPA, *Environmental Impact Statement: Criteria for Classification of Solid Waste Disposal Facilities and Practices* (Dec. 1979). Given the tonnage of animal manures produced annually, such an omission was not likely inadvertent.

amended neither the definition of solid waste nor EPA's practice of excluding animal manures.

Accordingly, EPA continued its longstanding practice of excluding animal manures from RCRA regulation. In 1988 EPA issued a report to Congress on the state of solid waste disposal in the United States. EPA noted that 2 billion tons of wet manure are produced annually by livestock in the United States, and also observed that manures returned to the soil are not covered by RCRA. EPA, *Report to Congress: Solid Waste Disposal in the United States* Vol. II, 3-31 (Oct. 1988). Similarly, in 1991 EPA defined a type of facility where solid wastes could be processed on the ground. EPA made clear that this "[l]and application unit" for solid waste "means an area where wastes are applied onto or incorporated into the soil surface (*excluding manure spreading operations*) for agricultural purposes or for treatment and disposal." 40 C.F.R. § 257.2 (emphasis added).

More recent EPA statements explain why EPA excludes animal manures utilized as a fertilizer or soil amendment from RCRA "solid waste." In September 2000, EPA noted that

> [a]nimal manure has been recognized for centuries as an excellent source of plant nutrients and as a soil "builder" in terms of its positive benefits to soil quality. Animal manure is an excellent source of nutrients for plants because it contains most of the elements required for plant growth. Livestock operators today are managing and using manure as an important and valuable resource. If managed and used properly, manure can provide benefits for the livestock operation, such as reduced commercial fertilizer use and increased soil quality.

EPA, *Profile of the Ag. Livestock Prod. Indus.*, EPA 310-R-00-002 (Sept. 2000). And, in a recent rulemaking, EPA observed that "[l]and application is the most common, and usually the most desirable, method[] of using manure and wastewater because of the value of the nutrients and organic matter they contain." EPA, *Development Document for the Final Revisions to the National Pollutant Discharge Elimination Sys. Reg. and Effluent Guidelines for CAFOs*, Dkt. No. EPA-HQ-OW-2002-0025-0039 at 8-146 (Dec. 2002). Thus, EPA recognizes that animal manures such as poultry litter have a valuable use to which they may be put, and therefore are

not RCRA solid waste. *See Safe Food*, 350 F.3d at 1269 (EPA arguing that material with substantial market value is not discarded solid waste).

EPA has thus held consistently that land applied animal manures are not a solid waste under RCRA. Fields where poultry litter has been applied do not become "open dumps" and poultry litter need not be trucked to a "sanitary landfill," as would be the case if it were a solid waste. Accordingly, poultry litter in the IRW is not a "solid waste" covered by RCRA.

C. Poultry Litter In The IRW Is Not A RCRA-Covered "Solid Waste"

The undisputed facts demonstrate that in the IRW poultry litter is bought, sold, and used as a fertilizer and soil conditioner, and is not merely discarded as garbage or refuse. Moreover, the relevant state regulators charged with enforcement of RCRA and supervision over the activities challenged in this lawsuit (with the obvious exception of the Attorney General), concur that poultry litter is not covered by RCRA. Therefore, under the foregoing statutory and regulatory schemes, the poultry litter at issue in this case is not a RCRA-covered solid waste.

1. Poultry Litter is land-applied and traded in the IRW as a valuable fertilizer and/or soil conditioner.

Poultry litter is widely recognized and used as an effective fertilizer and soil conditioner in the IRW. *See* Undisputed Facts ¶¶1-11. The farmers and ranchers from whom the Court has heard previously unanimously affirm the agronomic benefits of using poultry litter. Randall Robinson explained how litter from his poultry operation allows him to more than double his crop yields in support of his cow/calf operation, *see* P.I.T. at 1371:2-1372:14, 1379:16-1381:6 (Ex. 2), while saving him some $17,000 per year over the use of commercial fertilizers, *see id.* at 1381:7-1383:17. Similarly, R.A. Saunders explained how he used poultry litter to reclaim abandoned farmland and to substantially expand his cattle operation. *See* P.I.T. at 2048:14-2049:6 (Ex. 2). They also detailed poultry litter's economic value, including how access to litter

is an inducement to contract with Defendants to raise poultry. *See* P.I.T. at 1376:15-1377:1, 2024:25-2025:7, 2032:22-2034:25, 2045:1-4, 2048:14-2049:6 (Ex. 2).

Plaintiffs have not developed any contrary evidence showing Growers, farmers, or ranchers apply poultry litter simply to be rid of it, or that poultry litter has no economic value. *See* Fisher Dep. at 468:15-469:5. Quite the contrary, Oklahoma and its agents recognize poultry litter as an effective fertilizer, and actively encourage and approve of its use. *See* Undisputed Fact ¶8; *see also* Undisputed Fact ¶9 (Arkansas). The State provides an online marketplace to facilitate poultry litter transactions, which teaches that litter "can be utilized as a fertilizer for pastureland, cropland and hay production," is "an excellent source of the plant nutrients nitrogen, phosphorous and potassium," and also "returns organic matter and other nutrients to the soil, which builds soil fertility and quality." Ex. 10. State officials agree that poultry litter is used in the IRW in this manner. *See* Undisputed Facts ¶¶9-11, 12. To this end, poultry litter has substantial economic value, both as a substitute for more expensive commercial fertilizer and as a marketable commodity. *See* Undisputed Facts ¶¶11-13.

2. Oklahoma and Arkansas do not view poultry litter in the IRW as a RCRA solid waste.

In keeping with this practice, Oklahoma state officials have never treated poultry litter as a RCRA solid waste. Steve Thompson, Executive Director of the Department of Environmental Quality (ODEQ), who is charged with seeking the abatement of pollution, has never made any finding that any Defendant or Contract Grower has caused pollution in the IRW as alleged in this lawsuit. *see* Steve Thompson Dep. at 8:8-12, 18-1-19:15, 21:22-22:25 (Ex. 42). ODEQ, which implements RCRA, *see id.* at 23:13-24:22, has taken no action regarding poultry litter.

> Q. Has [ODEQ] made a finding that any of the defendants in this lawsuit have violated [RCRA]?
>
> * * *
>
> A. [I]n the context that we are talking about, no.

Q. [H]as [ODEQ] made a finding that any poultry grower under contract with any of the defendants in this lawsuit has violated [RCRA]?

* * *

A. No.

Id. at 31:7- 23. In fact, ODEQ has not exercised RCRA jurisdiction in this area at all.

Q. Has [ODEQ] made a finding that poultry waste is a solid waste under RCRA?

* * *

A. [I]n the context of this lawsuit, the answer is no.

* * *

Q. [D]oes [ODEQ] regulate poultry waste in that setting as a solid waste?

A. No.

* * *

Q. [H]as ODEQ elected to step in to assert jurisdiction with regard to the regulation of poultry waste management in Oklahoma?

A. As of this date, no.

Id. at 31:24-33:13. Scott Thompson, Director of ODEQ's Land Protection Division, responsible for non-hazardous wastes, confirmed that his Division has never treated poultry litter as a RCRA solid waste. *See* Scott Thompson Dep. at 17:21-24:25 (Ex. 25).

* * * * *

The law is clear that something becomes RCRA solid waste only when it is actually discarded, not when is has substantial market value and is put to a beneficial use. This represents the consistent view of Congress, the Courts, the EPA, and responsible State and local officials. Because the undisputed record evidence is that poultry litter is used and traded in the IRW as a valuable fertilizer and soil conditioner, poultry litter in the IRW is not a RCRA-covered solid waste. Summary judgment should therefore be granted on Count 3.

II. DEFENDANTS DO NOT "CONTRIBUTE TO" THE "PAST OR PRESENT HANDLING, STORAGE, TREATMENT, TRANSPORTATION, OR DISPOSAL" OF POULTRY LITTER

RCRA citizen suits apply only to those who have "contributed to" the "handling, storage,

treatment, transportation, or disposal" of "solid waste." 42 U.S.C. § 6972(a)(1)(B).[6] But Defendants do none of these. Instead, except for the rare company-owned farm, poultry litter is owned, controlled, land applied, transported, treated, or sold by individual Contract Growers, not Defendants. Therefore, Plaintiffs' RCRA claim fails.

In order to demonstrate "contributing to" liability, Plaintiffs must prove that each individual Defendant either handled, stored, treated, transported, or disposed of poultry litter, or controlled someone else's doing so. *Compare United States v. Aceto Ag. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989) (defendant liable for "contributing to" where the record was sufficient to allow an inference that it controlled a waste-disposing process), *with In re Voluntary Purchasing Groups*, 2002 WL 31431652, at *6 & n.2, *and S. Fl. Water Mgt. Dist. v. Montalvo*, 84 F.3d 402, 408-09 (11th Cir. 1996) (defendants not liable under CERCLA where they did not control the waste-disposing process). RCRA is precise in its language: it lists "handling, storage, treatment, transportation, or disposal;" it does not list *creation* or *generation*. 42 U.S.C. § 6972(a)(1)(B). These, therefore, are not a basis for RCRA liability. *In re Voluntary Purchasing Groups*, 2002 WL 31431652, at *6 (rejecting "contributing to" claim where defendant may have contributed to the generation, but not its subsequent "handling, storage, treatment, transportation, or disposal").

Accordingly, Plaintiffs must prove control not as to the *creation* of poultry litter, but as to

[6] The "contributing to" requirement restricts RCRA liability to those causally linked to the "handling, storage, treatment, transportation, or disposal" of a RCRA solid waste. *In re Voluntary Purchasing Groups, Inc.*, 2002 WL 31431652, at **5-7 (N.D. Tex. Oct. 22, 2002) ("Plaintiffs must establish some level of causation between the Defendant and the contamination to prevail in a 'contributing to' cause of action under RCRA"); *see also K-7 Entps. L.P. v. Jester*, 562 F. Supp. 2d. 819, 830-31 (E.D. Tex. 2007); *Hudson Riverkeeper Fund, Inc. v. ARCO*, 138 F. Supp. 2d 482, 487 (S.D.N.Y. 2001); *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237, 256 (S.D.N.Y. 1999); *Zands*, 779 F. Supp. at 1264; *First San Diego Properties v. Exxon Co.*, 1994 WL 424209, at *3 (S.D. Cal. 1994). Plaintiffs must demonstrate both cause-in-fact and proximate causation. *In re Voluntary Purchasing Group*, 2002 WL 31431652, at *6; *Hudson Riverkeeper*, 138 F. Supp. 2d at 487; *Zands*, 779 F. Supp. at 1264.

whether, how, when, where, or in what amount to use, sell or trade their poultry litter. Yet, Plaintiffs' allegations of control pertain solely to the actual raising of poultry. They allege that Defendants "control[] each stage of the growing process," and note that Defendants own the birds, establish standards for their care, and supply feed and medicine. SAC ¶¶31-41*; see generally* Exs. 3-8. But these regard the growing process only.

The record is otherwise clear that Defendants do not participate in, or in any way control, the Growers' sale, distribution, storage, or use of poultry litter. *See* Undisputed Facts ¶¶14-15, 17-23. Growers, not Defendants, typically purchase the bedding material for, and decide when to clean out poultry litter from, their poultry houses or barns. *See* Undisputed Facts ¶¶14-15. Growers, not Defendants, own the resulting poultry litter. *See* Undisputed Facts ¶¶15, 17. Growers, not Defendants, determine whether, when and how to sell, distribute, store or use the poultry litter, *see* Undisputed Facts ¶¶17-23, and retain all proceeds from the sale or distribution of poultry litter, *see* Undisputed Facts ¶¶21-23.[7] Growers determine the time, method, location, and amount of poultry litter to be applied consistent with their field-specific, state-approved litter management plans. *See* Undisputed Facts ¶19. Consistent with these facts, Oklahoma and Arkansas litter laws regulate these parties, not Defendants. *See* Undisputed Facts ¶¶24-25. In sum, Defendants do not control Contract Growers' use of their own poultry litter.

Because Plaintiffs cannot prove that Defendants themselves handle, store, treat, transport, or dispose of poultry litter, or demonstrate that Defendants control others in doing so, they cannot satisfy RCRA's "contributing to" requirement.

[7] Certainly, some Defendants' contracts require Growers to comply with applicable state laws and regulations. *See* Undisputed Facts ¶¶17-19. But provisions such as these do not demonstrate any control over poultry litter or a Grower's use or sale thereof. Moreover, courts have rejected the argument that control may be established from contractual provisions requiring compliance with applicable laws. *See Concrete Sales & Servs., Inc. v. Blue Bird Body*, 211 F.3d 1333, 1339 (11th Cir. 2000); *Jordan v. S. Wood Piedmont Co.*, 805 F. Supp. 1575, 1580 (S.D. Ga. 1992).

III. THE LAND APPLICATION OF POULTRY LITTER DOES NOT "PRESENT AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HEALTH OR THE ENVIRONMENT"

A citizen suit requires proof of "an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Plaintiffs allege both. SAC ¶94. Even if the Court concludes that poultry litter is a RCRA-covered solid waste, and that Defendants contribute to its handling, storage, transport, treatment, or disposal, partial summary judgment is nevertheless appropriate as to Plaintiffs' claims of risk to human health. To prove "an imminent and substantial endangerment," Plaintiffs must demonstrate that the challenged conduct results in either "actual harm" or "the risk of threatened harm." *Burlington N. & Santa Fe Ry v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007). The alleged "risk" must be "substantial," 42 U.S.C. § 6972(a)(1)(B), which means it must be proven to be "serious," *Burlington N.*, 505 F.3d at 1021. Accordingly, Plaintiffs must demonstrate "reasonable cause for concern that someone or something may be exposed to risk of harm by release, or threatened release, of [solid waste] in the event remedial action is not taken." *Id.*

Plaintiffs allege two discrete health risks: (i) that bacteria from poultry litter may endanger individuals recreating in or drinking water from the IRW; (ii) that nutrients from poultry litter may stimulate algae growth, which when removed by chlorination risks the creation of disinfection byproducts that may endanger human health. Neither claim should proceed.

A. Human Health In The IRW Is Not Endangered By Bacteria From Poultry Litter

Plaintiffs assert that the waters in the IRW contain fecal indicator bacteria derived from poultry litter that indicate the presence of pathogens that may endanger human health. This claim fails for two reasons:

First, as the Court concluded previously, Plaintiffs cannot prove that bacteria in the waters of the IRW derive from poultry litter as opposed to any number of other sources. Opinion

& Order, Dkt. No. 1765 at 1-2, 7 (Sept. 29, 2008). Indicator bacteria are shed by virtually every warm-blooded creature living in the IRW, not just poultry. *See* Undisputed Facts ¶30. As Plaintiffs' consultant Dr. Jennifer Weidhaas wrote candidly to her colleagues, this fact "is not good for the litigation against poultry farmers (*i.e.*, other sources of fecal material)." Ex. 44; *see* Macbeth Dep. at 208:9-212:24 (Ex. 38).

Instead, Plaintiffs must tie bacteria directly back to poultry litter. Such a link might perhaps have been established with a formal fate and transport study examining bacterial propagation from poultry litter into the IRW, including its reaction to environmental stresses such as sunlight, oxygen, temperature, humidity, pH, salinity, desiccation, topography, vegetation, and predation, and also accounting for alternate sources of the same bacteria. *See Allgood v. GMC*, 2006 WL 2669337, at **17-18 (S.D. Ind. Sep. 18, 2006); *Kalamazoo River Study Group v. Eaton Corp.*, 258 F. Supp. 2d 736, 756-57 (W.D. Mich. 2002); *City of Wichita v. Trustees of APCO Oil Corp. Liquidating Trust*, 306 F. Supp. 2d 1040, 1109-12 (D. Kan. 2003); *Hatco Corp. v. W.R. Grace & Co.-Conn.*, 836 F. Supp. 1049, 1060-61 (D.N.J. 1993). But Plaintiffs undertook no such study. *See* Undisputed Facts ¶26; *See Tyson Foods*, Slip. Op. at 14.

Plaintiffs' bacteria experts agree that such a study is appropriate in complex systems such as the IRW. *See* Harwood Dep. at 151:21-152:5 (in order be correlated across a system, bacteria "would have to have certain fate and transport characteristics in common") (Ex. 31); P.I.T. at 239:22-240:6 (Ex. 2) (Dr. Teaf explaining that in a system with multiple sources, some "contribution analysis" is necessary). Yet Plaintiffs performed no such analysis despite the facts that bacteria have many sources, move differently, respond differently to environmental stresses, and their ability to reach surface waters depends on where, when, and in what quantities they are deposited. *See* Undisputed Facts ¶¶26-27. Based on this record, it cannot be assumed that bacteria from poultry litter reach IRW recreational or drinking waters.

Instead, Plaintiffs rely on Dr. Harwood's "biomarker" theory, which this Court and the Tenth Circuit have rejected as novel and unreliable. *Tyson Foods*, Slip Op. at 19-20; Order & Opinion, Dkt. No. 1765 at 6-7. Her work has been twice rejected by peer reviewers and is inadmissible under Rule 702 as laid out in Defendants' *Daubert* motion to exclude her testimony. *See* Dkt. No. 2030 (May 5, 2009). If the Court grants that motion, Plaintiffs will lack any proof purporting to demonstrate the source of any bacteria in the waters of the IRW.

Second, Plaintiffs cannot demonstrate a health risk. Plaintiffs reply on the presence of non-pathogenic indicator bacteria, P.I.T. 632:6-634:4, but this approach is unsupported as to waters impacted by animal feces. *See* Undisputed Facts ¶31. As one peer reviewer reviewing Dr. Harwood's biomarker work noted:

> Correlation of poultry marker with fecal indicators … does not provide any evidence of human health risk. The relationship of fecal indicators with human health risk was developed at sites contaminated primarily with human waste (Dufour's publications, 1984 and 1986). This relationship is not expected to be the same for water contaminated with feces from nonhuman sources.

Ex. 37 at 3, cmt. 6. EPA has now convened experts to replace the current standards with, in its words, "up-to-date, scientifically-defensible criteria." *See* Undisputed Facts ¶32. In short, indicator bacteria from animals do not prove a health risk to humans.

Plaintiffs also were unable to develop factual support for their alleged risk. Plaintiffs tested for pathogens but found virtually none. *See* Undisputed Facts ¶33. Nor do illness rates in the IRW demonstrate any particular health risk from poultry litter. *See* Undisputed Facts ¶34. Indeed, Dr. Banner, one of the area's leading pediatric specialists, has seen no appreciable illness rates related to poultry litter. Ex. 40 at 1-6. Nor do Oklahoma public health officials perceive a health risk from poultry litter. *See* Undisputed Facts ¶35. Dr. James Crutcher, Oklahoma Commissioner for Health from 2003 to 2009, confirms that Oklahoma public health authorities have *never* assessed such a threat. *Id.*. Nor has ODEQ. *See* Steve Thompson Dep. at 34:19-25

(Ex. 42). In fact, individuals recreating in the IRW are at a substantially greater risk of food-borne bacterial infection than any risk from the water. *See* Crutcher Dep. at 38:5-39:17, 48:3-7; 98:16-20 (Ex. 39). Unsurprisingly then, Plaintiffs still cannot identify a single person sickened in the IRW by poultry litter. *See* Undisputed Facts ¶35; *Tyson Foods*, Slip Op. at 14.

Against this record, Plaintiffs' reliance on the presence of fecal indicator bacteria is insufficient to meet their burden under RCRA of proving a reasonable concern that bacteria from poultry litter may present a substantial endangerment to human health.

B. Human Health In The IRW Is Not Endangered By Disinfection Byproducts

Finally, Plaintiffs allege that excess phosphorous from poultry litter spurs the growth of algae. Plaintiffs claim that, when this water is treated for human consumption, removal of this algae may create disinfection byproducts (DBPs), which Plaintiffs allege may be harmful to human health. *See*, *e.g.*, Ex. 45 at 22-29. These claims rest entirely on the testimony of Plaintiffs' expert Dr. Chris Teaf. Defendants will separately file a motion to exclude his testimony on this point pursuant to *Daubert*. *See* Dkt. No. ____ (Sept. 18, 2009). If the Court agrees that Dr. Teaf's DBP testimony is inadmissible, Plaintiffs have no other evidence to support this allegation of risk to human health.

CONCLUSION

For the foregoing reasons, Defendants respectfully move the Court for an order of summary judgment dismissing Count 3.

Respectfully submitted,

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